

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

CIVIL ACTION NO. 1:10cv0837 (WOB-MRM)

ROGER SMITH

PETITIONER

VS.

ORDER

TIMOTHY BRUNSMAN, Warden,  
Lebanon Correctional  
Institution

RESPONDENT

This matter is before the Court on the Report and Recommendation of the Magistrate Judge (Doc. 26), who reviewed each of Petitioner's eight grounds for habeas relief under 28 U.S.C. § 2254 and recommends that the petition be dismissed with prejudice. Petitioner is represented by counsel, and counsel filed objections to the Report and Recommendation (Doc. 28). The Court has considered *de novo* those objections, and finds as follows.

Habeas counsel did not object to the Magistrate Judge's recommendations for Grounds One, Three, Five, Six, Seven or Eight, and did not object to one aspect of the analysis of Ground Two. Appellate review of these claims is, therefore, waived. *See, e.g., Javaherpour v. United States*, 315 F. App'x 505, 508-510 (6th Cir. 2009); 28 U.S.C. § 636(b)(1).

Counsel's objection to the procedurally-defaulted prosecutorial misconduct claims misunderstands where the default occurred. The basis for the procedural default was not the federal "fair presentation" requirement for exhaustion. See Doc. 28 at 4-5. The default enforced by the state court, as discussed by the Magistrate Judge, was the state contemporaneous objection rule and trial counsel's failure to object to certain remarks made by prosecutor at trial. See Doc. 26 at 7-10. As for habeas counsel's discussion of prosecutor's comments that the jurors were in the same room with "two murderers," these comments fall within these procedurally-defaulted claims.

Habeas counsel's specific objections to the lack of a instruction on involuntary manslaughter and to the prosecutor's comment, construed as alluding to Petitioner's failure to testify, are without merit.

Therefore, the Court being sufficiently advised,

**IT IS ORDERED** that the objections (Doc. 28) to the Report and Recommendation of the Magistrate Judge be, and they are, hereby **overruled**; that as noted above the Report and Recommendation of the Magistrate Judge (Doc. 26) be, and it is, hereby **adopted** as the findings of fact and conclusions of law of the Court; that the petitioner's § 2254 petition (Doc. 2) be, and it is, hereby **denied**; that no certificate of appealability shall issue herein; and that any application to proceed *in forma*

*pauperis* on appeal would not be taken in "good faith." A separate Judgment shall enter concurrently herewith.

This 14th day of February, 2012.



**Signed By:**

**William O. Bertelsman** *WOB*

**United States District Judge**